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IN THE

Supreme Court of the United States

October Term, 1992

HENRY G. CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Petitioners,

v.

ALPINE RIDGE GROUP, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ACACIA VILLA, ET AL.

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QUESTION PRESENTED

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, is an unconstitutional attempt by Congress to save money by legislatively abrogating express provisions of contracts of the United States to which the United States solemnly pledged its faith and for which the private parties paid independent consideration?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the Brief for the Petitioners, Acacia Villa, a California general partnership, is a party to these proceedings.

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STATEMENT OF THE CASE

These cases were decided on cross-motions for summary judgment. The courts below ruled for the owners in light of the facts contained in uncontroverted affidavits and other elements of the record now before this Court. The United States Department of Housing and Urban Development's ("HUD") Statement of the Case ignores or contradicts this record and omits material facts concerning the Section 8 program. To provide the Court with the background necessary for review of the decisions below, Acacia Villa presents this Statement of the Case.

I. AUTOMATIC ADJUSTMENTS ARE A CENTRAL FEATURE OF THE SECTION 8 PROGRAM AND OF THE HAP CONTRACTS

Congress created the Section 8 program in 1974 by enacting Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f (1976), to cure the defects of its immediate predecessor, the Section 236 low-income housing program. Under the Section 236 program, HUD provided developers a fixed subsidy in the form of reduced mortgage rates. Rent adjustments for increased costs under Section 236 were based on case-by-case review by HUD. The procedures HUD used for determining rent increases under Section 236 were arbitrary; they did not yield a fair rate of return; they cost owners large amounts of time and money; they were open to subjective manipulation by HUD employees; and they were slow. Declaration of Jona Goldrich (May 30, 1990) ¶ 3 ("Goldrich Declaration"), J.A. at 36. As a result, rents lagged well behind actual changes in costs. *Id.* Because of rapid inflation in the late sixties and early seventies, these problems became so severe that they contributed to the bankruptcy of many Section 236 projects.[1]

In the Section 8 program, HUD pays the owner a flexible subsidy which is calculated as the difference between the rent paid by the tenant (a statutory percentage of his or her income) and the "Contract Rent." The initial Contract Rent negotiated between HUD and the owner was incorporated into a Housing Assistance Payments Contract ("HAP Contract") between HUD and the owner.[2] In marked contrast to the predecessor Section

[1] During the 1973 Congressional hearings that led up to the enactment of the Section 8 program, the Secretary of Housing and Urban Development predicted foreclosure over the next decade of 20% of the Section 236 projects. *Administration's 1973 Housing Proposals: Hearings on S.2490, S.2507 and S.2508 before the Committee on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 10 (1973) (statement of James T. Lynn, Secretary of Housing and Urban Development).

[2] The statute provided that the initial Contract Rent could exceed the "Fair Market Rental" for moderate and low income housing of the same size and type in the market area, but not by more than 20%. 42 U.S.C. § 1437f(b)(1976). HUD regulations also required that Contract Rents be "reasonable." 24 C.F.R. § 880.204 (1992). Rents were considered reasonable if they exceeded by no more than 20% the amount determined by HUD on the basis of market comparisons with unassisted units of similar age, design and location which provided comparable amenities and services, and the excess was warranted by cost and expense estimates and cost certification. 24 C.F.R. § 880.204(b)(1)(ii) (1992). These guidelines left HUD with considerable leeway to negotiate Contract Rents at a level sufficient to make the projects feasible.

236 program, the statute provides two methods for adjusting the Contract Rent to compensate for inflation in subsequent years: (1) "changes in fair market rentals" or (2) a "reasonable formula." 42 U.S.C. § 1437f(c)(2)(A) (1976).[3] Both methods of rent adjustment are based on widely-applicable, publicly-scrutinized data. The reasonable formula method further limits the opportunities for bureaucratic meddling and manipulation, basing rent adjustments on a published Automatic Annual Adjustment Factor ("AAAF"). The AAAFs are developed by HUD's Office of Economic Affairs using data derived from the Consumer Price Index and from the American Housing Survey conducted by the Bureau of the Census. Declaration of David E. Shenk (Nov. 14, 1990), J.A. at 50. AAAFs are, or should be, published for comment.[4]

In order to provide maximum assurances to potential developers of Section 8 housing that the Section 8 program would be entirely different from the discredited Section 236 program, HUD agreed in the HAP Contracts to use the "reasonable formula" method to adjust rents "by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." HAP Contract § 1.9(b)(2). In

[3] Special "additional adjustments," not at issue in this proceeding, are provided for in 42 U.S.C. § 1437f(c)(2)(B) (1976).

[4] HUD in fact often fails to publish AAAFs for comment, but admits that it should do so. 44 Fed. Reg. 65,924 (1979).

the summary judgment proceedings below, plaintiffs established by undisputed affidavits that HUD both understood and marketed the Section 8 program as one in which rents would be adjusted by applying a published adjustment factor, rather than on a case-by-case basis. Affidavit of Dean Chaussee (Apr. 6, 1990) ¶¶ 7-8 ("Chaussee Affidavit"), J.A. at 27-29. It was also undisputed that owners "participated in the Section 8 program only because the Section 8 HAP contracts, unlike the Section 221(d)(3) and Section 236 program contracts, provided for rent adjustments to be computed at least annually according to an equitable, timely and simplified formula to be published in the *Federal Register*." Goldrich Declaration ¶ 3, J.A. at 36.[5]

The statute, in a separate sub-section, limits the amount of adjustments. Whether made by "changes in fair market rentals" or by a "reasonable formula," adjustments are not to lead to "material differences between the rents charged for assisted and comparable unassisted units." 42 U.S.C. § 1437f(c)(2)(C) (1976). The "overall limitation" provision of the HAP Contracts, § 1.9(d), echoes this statutory command. HUD reads into this limitation clause authority for HUD to scrap the automatic formula method provided in the HAP Contracts and to substitute an entirely different case-by-case methodology for adjusting rents not provided for in the statute or in the contracts. HUD Brief at 8, 13, 16, 17, 19, 26. The owners contend, as the Court of Appeals for the Ninth Circuit held, that while the limitation

[5] HUD now attempts to contradict these facts by quoting snippets of testimony given in Congressional hearings years after the HAP Contracts were signed by a person who is not a party to the litigation. HUD Brief at 23-24. The passages HUD quotes do not support HUD's position. They merely state that Contract Rents are not to be materially different from those for comparable unassisted units. They do not suggest that in implementing this provision HUD is free to abandon the formula method. In any case, HUD did not contest the plaintiffs' factual allegations in the summary judgment proceedings and may not do so now. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970).

requires HUD to modify the applicable AAAF when necessary to avoid such material differences, the limitation does not allow HUD to substitute an entirely different methodology of making adjustments for that provided in the contracts.

II. FOR MANY YEARS HUD IMPLEMENTED THE LIMITATION IN ACCORD WITH ITS CONTRACTUAL OBLIGATION TO USE A FORMULA TO ADJUST RENTS

From the beginning of the Section 8 Program, HUD was aware of the possibility that variances within the market area could cause Section 8 rents adjusted by the AAAF to differ materially from the rents for comparable unassisted units in certain sub-markets. HUD responded to that possibility until the early 1980s in the way required by the HAP Contracts, *i.e.*, by checking that the AAAFs were producing appropriate adjustments and by preparing separate AAAFs for any sub-market in which the AAAF for the larger market would produce inappropriate adjustments. When it published AAAFs in 1976, HUD requested comments "on alternate approaches or data sources which could provide information on smaller sized areas than those being published at this time." 41 Fed. Reg. 49,440 (1976). In response to the comments received, HUD announced that "additional Adjustment Factors will be published where market conditions indicate a need to publish factors for particular areas." 42 Fed. Reg. 60,508 (1977); *see* 24 C.F.R. § 888.202 (1977).[6] HUD Handbook 7420.1, *Section 8 Housing Assistance Payments Program New Construction Processing Handbook* (1975) ("HUD Handbook") instructed HUD field offices to "review the accuracy of the rent adjustment to ensure that it is comparable (neither too high nor too low) in relationship to similar assisted or unassisted units." HUD Handbook

[6] The current regulations continue to foresee publication by HUD of "revised factors applicable only to specific areas." 24 C.F.R. § 888.202 (1992).

§ 7-8(a)(4). If the study showed that the rent adjustments were not accurate, the HUD Handbook required preparation of a revised factor: "If the adjustment is not comparable, the AHM Branch shall revise the factor." *Id.*

In the early 1980s, in response to pressure to cut rents, or at least slow their increase well below the level of inflation, HUD devised several expedients. HUD attempted to circumvent the HAP Contracts, that called for rents to rise automatically with inflation in rental levels, by proposing regulations that would have required rent increases to be calculated by applying a factor designed to reflect increases in operating costs to the contract rent less debt service. This not very subtle way of shifting the burden of inflation from HUD to the owners provoked the following comments from the Chairman of the House Subcommittee on Housing and Community Development:

> I recognize that the Department is undoubtedly being directed to stick by its guns through the orders of the Office of Management and Budget. But it is a sorry day when any agency of the Government, in the name of economy, stands ready to corrupt contracts, vitiate and violate the law, and generally operate in a style more appropriate to a small-time dictatorship.[7]

Under fire, HUD abandoned the proposal for cost-based adjustments, but the change from the automatic formula rent adjustments required by the HAP Contracts to case-by-case adjustments carried out by HUD field offices is merely another illegal attempt to shift the burden of inflation from HUD to owners.

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[7] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearings before the Subcommittee on Housing and Community Development of the Committee on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. at 2 (1984) (remarks of Mr. Gonzalez).

III. HUD IS ATTEMPTING TO AVOID ITS OBLIGATIONS, NOT WINDFALLS

Throughout its brief, HUD seeks to portray the owners as rapacious landlords attempting to reap windfall profits by collecting rents higher than those for "comparable unassisted units."[8] HUD also argues repeatedly that owners cannot have been harmed by "comparability studies" because owners are not entitled to rent higher than that for comparable unassisted units.[9] These two assertions constitute the underpinning of HUD's entire argument.

HUD's assertions derive whatever surface plausibility they may have from the stroke of genius of the HUD official who invented the name "comparability studies" for HUD's case-by-case adjustments of rent. The name suggests a scientific process that determines objectively and with a high degree of accuracy the rent for a fully comparable unassisted apartment. Nothing could be further from reality.

If the rents HUD is paying under its "comparability studies" were actually market rents for units with comparable features and comparable construction and operating costs, the owners of Section 8 projects would not now be in dire financial straits. Plaintiffs in *Alpine Ridge Group v. Kemp*, 764 F. Supp. 1393 (W.D. Wash. 1990), *aff'd*, 955 F.2d 1382 (9th Cir.), *cert.*

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[8] *See* HUD Brief at 24 (owners claim "above-market rent increases"), 30 (owners claim "substantial windfall payments"), 31 n.28 ("*Rainier View* gave owners rent for which they did not contract").

[9] *See* HUD Brief at 13 (Section 801 leaves the owners' economic rights intact), 22 (no matter what methodology HUD employs, the bottom line for the owners would be the same), 29 (Section 801 leaves intact rules governing amount project owners are entitled to, except retroactively where Congress increased the amount of payments HUD must make), 30 (Section 801 puts owners in better financial position than their contracts require), 31 (Section 801 requires HUD to pay an amount greater than that for comparable unassisted units), 33 (statute does not materially alter owners' rights).

granted, 113 S. Ct. 490 (1992) established by unopposed affidavits that seventy-five percent of project owners were receiving no return on their time and investment, Declaration of Janet Marie (May 31, 1991) ¶ 8, J.A. at 56. The *Alpine Ridge* court found that, far from enjoying windfall profits, many owners teeter on the edge of bankruptcy. *Alpine Ridge Group v. Kemp*, Order Denying Defendants' Motion for Stay Pending Appeal (*Alpine* Clerk's Document No. 111, May 21, 1991). The *Acacia Villa* plaintiffs established that owners face the specter of serious financial difficulties in making repairs and providing necessary security measures. Goldrich Decl. ¶ 23, J.A. at 42-43. The ultimate victims of all this are the tenants. HUD simply ignores these uncontroverted facts when it inveighs against imaginary windfalls.

A. "Comparability Studies" Are Inherently Subjective And Imprecise

It is critical to the understanding of this case that the Section 8 program required Section 8 apartments to differ in material ways from unassisted low and moderate income apartments produced by the market. Section 8 was intended to put an end to government-sponsored ghettos for poor people. Section 8 apartments were, therefore, often built in neighborhoods where land values are higher than those in neighborhoods where most unassisted low and moderate income apartments are located. Chaussee Aff. ¶ 10, J.A. at 30-31. In addition, HUD regulations required Section 8 buildings to have numerous costly features not found in other moderate and low income housing (*e.g.*, fire rating and alarm systems, and multi-purpose areas, emergency call systems, security systems, and wheelchair accessibility. *Id.*, J.A. at 31. The cost of building Section 8 apartments was further increased by the requirement to pay Davis-Bacon Act wages. HUD's onerous operating and reporting requirements increased the operating costs of Section 8 apartments. *Id.* Plaintiffs established in the summary judgment proceeding by unopposed

affidavit that for these and other reasons, on most occasions there were no closely comparable apartments in the unassisted market. *Id.*, J.A. at 30-32.

Because the negotiated initial rents were subject to a "rent reasonableness" constraint, as part of the process of negotiating the initial rent, HUD attempted to determine what the market rental for each proposed unit would be. 24 C.F.R. § 880.204(b)(1)(ii); HUD Handbook § 9-3d(2). HUD identified the most closely comparable (or least dissimilar) apartments that actually existed in the market. HUD recognized, however, that because of the lack of fully comparable units it would be necessary to make adjustments for:

> all significant differences between each comparable unit and the subject unit, taking into consideration such things as location, age, condition, size of units (overall square feet), number and furnishability of rooms, equipment, amenities, utilities, and services included in the rent, quality, management and maintenance services and all other significant differences.[10]

After all these adjustments were made, HUD employees performing the rent reasonableness study were authorized to make an additional 10 percent adjustment to compensate for increased security services and the higher costs of owning and maintaining assisted family and elderly/handicapped units. HUD Handbook § 9-3i. Once an employee making the initial determination reached what HUD described as a "subjective judgment" about what constitutes a "reasonable" initial rent for the assisted unit, *id.* § 9-3m, Housing Division Directors and Chief Appraisers were authorized to amend the employee's finding when they believed the employee's finding had been "more conservative than the circumstances and data warrant." *Id.* § 9-3n(6).

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[10] HUD Handbook § 9-3d(2).

These calculations gave rise to HUD's determination of a "reasonable" rent for the proposed Section 8 unit. Plaintiffs established by unopposed affidavit that this number was usually significantly higher than the market rent for the most comparable existing units used as the starting point of the process. Chaussee Aff. ¶ 11, J.A. at 32-33.

During the years at issue, HUD had no regulations governing what HUD calls "comparability studies." Not surprisingly, different HUD field offices performed them in significantly different ways. *Id.* ¶ 12, J.A. at 34-35. HUD's description of the general outlines of the process, however, shows that "comparability studies" were basically similar to the highly subjective and imprecise rent reasonableness studies just described. Declaration of James J. Tahash (Nov. 13, 1990) ¶¶ 5-6, J.A. at 48.

There is, however, a crucial difference between the significance of a rent reasonableness study and a "comparability study." If HUD failed to establish for a proposed Section 8 project a contract rent the developer considered appropriate, the developer was free to reject HUD's offer and avoid spending millions of dollars to build and operate the project. Once a HAP Contract is in place, however, giving HUD the power to make subjective and unilateral rent adjustments leaves the owner, who performed under the contract, completely at HUD's mercy.

B. "Comparability Studies" Were Carried Out So Arbitrarily They Do Not Measure Anything

The inherently subjective nature of the "comparability" process is compounded by the absence of detailed, well-reasoned guidelines. As the District Court in *Rainier View* found, HUD had no "uniform guidelines to be applied on a consistent, nationwide basis" in carrying out "comparability studies." *Rainier View Associates v. United States* (W.D. Wash.), Order Jan. 15, 1986, *reproduced in United States v. Rainier View Associates*, Petition for a Writ of *Certiorari* at 16a, 30a (1988). As a result, comparability decisions lay within the

"totally unfettered discretion of the personnel in the particular field office." *Id.* Comparability decisions were made without any "consistent system or methodology." *Id.* These defects were so egregious that the District Court in *Rainier View* held that HUD violated procedural due process in performing its "comparability studies." *Id.* at 33a.

In 1987, Congress rebuked HUD for making "capricious individualized rent reductions . . . on an ad hoc and arbitrary basis in the absence of published procedures." H.R. Rep. No. 122, 100th Cong., 1st Sess. 32 (1987). In 1989, the staff of the Senate Banking, Housing and Urban Affairs Committee condemned the "serious procedural deficiencies" in HUD's application of comparability, by which "[o]wners were harmed." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989). In the Ninth Circuit, HUD candidly admitted that "in Congress' view, [HUD] maladministered the comparability process." Brief for Appellants in *Alpine Ridge v. Kemp* and *Acacia Villa v. Kemp*, Nos. 91-35267, 91-55354 ("HUD Ninth Circuit Brief") at 45. Under these circumstances, there is no reason to believe the "comparability studies" are an accurate measure of anything, and certainly not of the rent adjustments to which owners are entitled under their HAP Contracts.

IV. THE COURTS HAVE REBUFFED HUD'S ATTEMPT TO REPUDIATE ITS OBLIGATIONS

In *Rainier View Associates v. United States*, 848 F.2d 988, 991 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the Court of Appeals for the Ninth Circuit recognized that the HAP Contracts, like the underlying Section 8 statute, require adjustments that "keep assisted rents in line with market rents." The Ninth Circuit, however, rejected HUD's contention that the overall limitation provision authorizes HUD to abandon the formula method of rent adjustment it elected in the HAP Contracts and adjust rents instead on a subjective, case-by-case, market survey basis. *Id.* Applying the principle that all

provisions of a contract should be harmonized and given effect, the Ninth Circuit held that "[t]he overall limitation provision of the statute and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey [*i.e.*, a "comparability study"]." *Id.* The limitation provision, the Ninth Circuit held, "authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another." *Id.*

Rainier View in no way denied HUD's right to verify whether application of the AAAF produces in a given submarket rents that are materially higher or lower than those of fully comparable unassisted units. Nor did *Rainier View* deny HUD's discretion as to how to determine whether an adjustment falls in the proper range. Under the Ninth Circuit's analysis, HUD could rely on "comparability studies" as a way of satisfying itself that the AAAF adjustments fall into the proper range. *Rainier View* held, however, that when a "comparability study" or something else indicates to HUD that in a particular local market use of the AAAF for the larger market area is producing adjustments that are inappropriately high or low, HUD is required by the HAP Contract to publish an AAAF for the submarket which will "keep assisted rents in line with market rents," *id.* at 991, and may not directly set rents on the basis of the "comparability study."

This is not a mere quibble over technicalities. HUD admits that AAAFs must "satisfy standard statistical criteria for reliability." *Report to Congress on the Adjustment of Contract Rents Under Section 8(c)(2)(C) of the United States Housing Act of 1937* (1990) at 3-4, lodged by HUD with the Court. A number which masqueraded as an AAAF, but rested on an *ad hoc* "comparability study" that extrapolates from the rent for three

to five unassisted apartments, does not come close to satisfying standard statistical criteria for reliability. Failure to recognize the substantial difference between easily manipulated, subjective "comparability studies" and statistically reliable indices of inflation underlies HUD's claim that the owners are complaining about minor procedural defects rather than about anything of substance. *See* HUD Brief at 34.[11]

Shortly after this Court refused to review the Ninth Circuit's *Rainier View* decision, HUD notified all owners of Section 8 apartments located in the Ninth Circuit that it would apply the *Rainier View* decision to them without need for them to bring suit. Goldrich Decl. ¶ 16, J.A. at 40-41. Nonetheless, several months later HUD requested Congress to overrule the Ninth Circuit's decision. 135 Cong. Rec. H9685 (daily ed. Nov. 21, 1989). Congress acceded to HUD's request in part by enacting Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057.

Section 801 provides that retroactive rent adjustments shall be made by applying the published AAAF not to the full Contract Rent but to the Contract Rent reduced by the amount of Contract Rent attributable to debt service, with the proviso that in no case are the adjustments to be less than 30 percent of the adjustment that would result from applying the AAAF to the full Contract Rent. Retroactively, therefore, the effect of Section 801 is to reduce the amount of the payments owners will receive by reducing the base to which the AAAF is applied.[12]

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[11] The Claims Court's failure to understand this point is a major flaw in its opinion. *See National Leased Housing Association v. United States*, 22 Cl. Ct. 649, 662 (1991) (Claims Court states that the issue is whether HUD could use results of comparability studies directly to set rent or was obliged to translate results of comparability studies into modified AAAFs).

[12] Amicus AFL/CIO suggests that calculation of past adjustments by applying the AAAF to the Contract Rent minus the amount required for debt

As regards future rent adjustments, in direct contradiction to the HAP Contracts as interpreted in *Rainier View*, Section 801 permits HUD to use "an alternative methodology," including what HUD calls "comparability studies," as an independent method of rent adjustment, whenever the Secretary determines that establishing an AAAF for smaller sub-markets will not eliminate rent disparities.

Two groups of owners of Section 8 Housing challenged Section 801 in the Western District of Washington and in the Central District of California. Both district courts found Section 801 unconstitutional because it deprives the owners of vested contract rights without due process of law. *Alpine Ridge v. Kemp*, 764 F. Supp. 1393 (W.D. Wash. 1990), *aff'd*, 955 F.2d 1382 (9th Cir. 1992), J.A. at 15a; *Acacia Villa v. Kemp*, 774 F. Supp. 1240 (C.D. Cal. 1990), *aff'd*, 955 F.2d 1382 (9th Cir. 1992), J.A. at 40a. The Ninth Circuit consolidated the two cases and affirmed in a unanimous opinion. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992), J.A. at 1a. This Court granted *certiorari*.

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service is appropriate because the amount of debt service does not increase with inflation. This betrays a lack of understanding of what the AAAF is. The AAAF is not an index of changes in operating costs but rather an index of changes in rent levels. Applying an index of changes in rents to only that portion of the rent which is not required for debt service deprives owners of a significant portion of the adjustment to which they are entitled under the HAP Contracts and in simple justice. This can be clarified with an example. Suppose that a factory worker's union contract calls for a base wage of $15.00 a hour to be increased each year by the increase in the Consumer Price Index during the previous 12 months. In a 12 month period, the Consumer Price Index increases by 10%, but all of the increase is due to increases in the energy component of the Consumer Price Index. Although expenditures for energy constitute only 1/5th of the average worker's total expenditures, workers under the contract are entitled to a raise of $1.50 an hour ($15.00 x 10%), not to a raise of $.30 an hour (the $3.00 portion of the $15.00 wage spent for energy x 10%).

SUMMARY OF ARGUMENT

This case involves a constitutional challenge to an Act of Congress that abrogates key provisions of Housing Assistance Payments Contracts ("HAP Contracts") between HUD and the owners of low and moderate income housing units. The HAP Contracts implement a housing assistance program Congress created in 1974 by adding Section 8 to the United States Housing Act of 1937, 42 U.S.C. § 1437f. Under the Section 8 program, HUD pays the owners the difference between the rent paid by tenants and a Contract Rent negotiated by the parties and incorporated into the HAP Contract. The statute provides that the Contract Rent shall be adjusted annually based either on "changes in fair market rentals" or a "reasonable formula." 42 U.S.C. § 1437f(c)(2)(A) (1976). The statute also provides that such adjustments in the Contract Rent "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. §1437f(c)(2)(C) (1976).

HUD elected in the HAP Contracts to use the reasonable formula method authorized by statute for adjusting rents. Under this method, rent adjustments are made in accordance with a published Automatic Annual Adjustment Factor ("AAAF") developed by HUD's Office of Economic Affairs using data derived from the Consumer Price Index and the American Housing Survey conducted by the Bureau of the Census. The HAP Contracts contain an "overall limitation" clause providing that adjustments shall not result in material differences between the rents charged for assisted and comparable unassisted units except to the extent such differences may have existed with respect to the initial Contract Rent. HAP Contract §1.9(d). In a prior decision, *Rainier View Associates v. United States*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the Ninth Circuit held that the "overall limitation" provision permits HUD to adjust the AAAF when necessary to avoid rent

differentials, but "does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey." 848 F.2d. at 991.

Following the *Rainier View* decision, Congress enacted Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, as an amendment to Section 8 of the United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888. Section 801 abrogates the provisions of the HAP Contracts by: (1) allowing HUD to make rent adjustments retroactively by applying the published AAAF not to the full Contract Rent, but to the Contract Rent reduced by the amount of the Contract Rent attributable to debt service, with the proviso that in no case are the adjustments to be less than 30 percent of the adjustment that would result from applying the AAAF to the full Contract Rent, and (2) allowing HUD to base future rent adjustments on "comparability studies" whenever the Secretary determines that establishing an AAAF for sub-markets will not eliminate rent disparities. The government has estimated that Section 801 will save HUD in excess of one billion dollars in rent subsidies. The Ninth Circuit, in the case under review, held Section 801 unconstitutional because it deprives owners of vested contract rights without due process of law. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992).

1. In its brief, the government assails *Rainier View's* construction of the HAP Contracts, arguing that the overall limitation provision of the HAP Contracts authorizes HUD to adjust rents in any way it chooses whenever HUD unilaterally determines that rent adjustments for an individual Section 8 project based on the published AAAFs will lead to material differences between rents for assisted and comparable unassisted units. This interpretation of the limitation provision is not supported by its language or any of the established rules of contract construction.

It is clear from the plain language of the HAP Contracts that rents must be adjusted by applying the AAAF. The limitation clause does not mention any other method of rent adjustment. Rather, the limitation clause expressly applies to "adjustments under this section," *i.e.*, adjustments calculated by applying the AAAF. The fact that the limitation applies "notwithstanding any other provision of this Contract" only resolves inescapable conflicts between the limitation and other contract provisions. The limitation provision can be readily harmonized with the "reasonable formula" elected by HUD in the HAP Contracts by modifying the AAAF to eliminate any disparities in particular sub-markets, which is what HUD did between 1974 and the early 1980s. What cannot be harmonized are the contract provisions for adjustments based on a published, objective and statisically reliable formula and HUD's attempt to make adjustments based on *ad hoc* market surveys HUD calls "comparability studies."

The intent of the parties becomes unmistakably clear when the HAP Contracts are read against the background of the statute, the implementing regulations, HUD Handbook provisions, and the parties' course of dealing. The limitation clause in the statute does not prescribe a method of rent adjustment but rather simply imposes a limit on the amount of the adjustments "hereinbefore provided." The adjustments "hereinbefore provided" are to be based on "changes in fair market rentals" or on "a reasonable formula." The statute thus confirms that adjustments are to be made by one of the two statutory methods and not by any method HUD believes will achieve a desired result.

HUD chose to write contracts that call for rent adjustments on the basis of the AAAF. The HUD regulations in force at the time the contracts were being negotiated and contemporaneous HUD handbooks published for the guidance of program participants expressly stated that HUD would insure comparability

by publishing AAAFs for local markets where use of the AAAF for a larger market would lead to material differences. In presentations, HUD sold the Section 8 program to developers as a program in which rents would be automatically adjusted on the basis of published objective measures of inflation, not on the basis of subjective case-by-case judgments. The record shows that the owners decided to participate in the program only because it included automatic rent adjustments. For at least seven years, HUD gave evidence of its own understanding of the HAP Contracts by implementing the comparability limitation through publication of AAAFs for smaller sub-markets where this was necessary. Nothing in the language of the HAP Contracts, the parties' course of dealing, or any rule of contract interpretation contradicts *Rainier View*'s holding that rent adjustments based on "comparability studies" violate the HAP Contracts.

2. As HUD admitted in the courts below, Section 801 substantially impairs the owners' rights. Retroactively, it reduces the amount of the rent to which they are entitled by reducing (in many cases by as much as 70 percent) the base to which the AAAF is applied in calculating rent adjustments. Prospectively, it abrogates a central term of the HAP Contracts by permitting HUD to pay the lower rents it determines on an *ad hoc* case-by-case basis rather than the rents determined by applying an AAAF that properly reflects inflation in the local market.

Contract rights for which owners have provided independent consideration by building and operating Section 8 projects are property rights protected by the Fifth Amendment. As HUD admits, saving money is not sufficient constitutional justification for abrogating the rights of private parties under contracts with the United States for which the private parties have provided independent consideration.[13] The measures

[13] *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986); *Perry v. United States*, 294 U.S. 330 (1935);

Congress took in Section 801 are designed simply to save money by reducing the payments to which Section 8 owners are entitled. The legislative history strongly confirms that in Section 801 Congress had only one thing in view: saving money. As legislation that abrogates rights under federal contracts merely to save money, Section 801 is invalid.

Nothing in the text of Section 801 or in its legislative history provides any support for HUD's contention that Section 801 was enacted to restore uniformity to a national program. Moreover, even if there were some support for HUD's contention that Section 801 was enacted to restore uniformity, that goal would not be sufficient justification since it is simply a polite way of saying that Section 801 is justified by HUD's desire not to obey *Rainier View*. No government contract would be worth the paper it is written on if, after violating the contract and losing in court, the government could justify legislation overturning the court's decision on grounds that the decision destroyed uniformity in the administration of the contract.

Section 801's abrogation of the owners' rights cannot be justified on the ground that those rights were always subject to legislative defeasance under *Bowen v. Public Agencies Opposed to Social Security Entrapment* (*POSSE*), 477 U.S. 41 (1986). Unlike the situation in *POSSE*, the rights here at issue are central terms of a contract with a private party for which the owners provided independent consideration. The HAP Contracts, far from simply mirroring the underlying legislative scheme as did the agreement in *POSSE*, specified that owners are entitled to rent adjusted by applying the AAAF. Furthermore, Section 801, unlike the legislation in *POSSE*, is not an exercise of the police power or any other paramount power of Government to provide better housing for poor families. On the contrary, Section 801

Lynch v. United States, 292 U.S. 571 (1934); *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977).

harms poor families by depriving owners of the money needed to maintain Section 8 apartments properly and to provide adequate security measures.

Section 801 cannot be justified as curative legislation. The curative legislation cases merely uphold statutes against constitutional challenges on grounds of impermissible retroactivity. Section 801 would be unconstitutional even if its effects were only prospective. The purported curative character of legislation does not justify abrogation of vested rights under a contract with the federal government for which a private party has provided independent consideration.

ARGUMENT

I. UNDER THE HAP CONTRACTS OWNERS ARE ENTITLED TO RENT ADJUSTMENTS DETERMINED BY APPLYING A PUBLISHED AUTOMATIC ADJUSTMENT FACTOR

In interpreting these government contracts, as in interpreting contracts between private parties, the primary function of the courts is to discern and give effect to the parties' intention. *See, e.g., SCM Corporation v. United States*, 675 F.2d 280, 283 (Ct. Cl. 1982); *Steve Altman Photography v. United States*, 18 Cl. Ct. 267, 275 (1989). Even read in isolation, the contract language supports the Ninth Circuit's interpretation of the parties' intent. That intent becomes unmistakably clear when the HAP Contract is read against the background of the statute, the implementing regulations, HUD Handbook provisions, HUD's election of the automatic formula method of rent adjustment, and the parties' course of dealing.

A. The Plain Language Supports The Ninth Circuit's Interpretation Of The HAP Contracts

Section 1.9 of the HAP Contracts typically contains the following provisions:

> b. Automatic Annual Adjustments
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.
>
> ***
>
> d. Overall Limitation. Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government, provided that this limitation shall not be construed to prohibit differences in rents between assisted and unassisted units to the extent that such differences may have existed with respect to the initial Contract Rent.

There is no dispute that Section 1.9(b)(2) of the HAP Contracts expressly requires the AAAF method of adjusting rents: "the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor." HUD contends, however, that if a "comparability study" indicates that application of the AAAF would lead to material differences in any particular sub-market, the overall limitation provision by implication absolves HUD from its contractual obligation to adjust rents by applying an automatic adjustment factor and

allows HUD to adjust rents *in any way it chooses*. HUD Brief at 26.

HUD stresses over and over again that the limitation provision applies "notwithstanding any other provisions of this Contract," as if that settled the issue in HUD's favor. What deserves equal emphasis, however, is that the "notwithstanding" clause by its terms only limits the rent adjustments which would otherwise result from the AAAFs. It does not by its terms permit HUD to substitute for the published, statistically-reliable formula method required by the HAP Contracts whatever other method HUD or one of its field offices subjectively determines on an *ad hoc* basic will produce a desired result.

HUD itself admits that Section 1.9(d) does not expressly address the question of how rents are to be adjusted if application of the unmodified AAAF would lead to material differences. HUD Brief at 19 n.17. By its terms Section 1.9(d) limits the size of the adjustments "provided in this Section." The reference to adjustments "provided in this Section" indicates that Section 1.9(d) is intended to limit the size of adjustments made by applying the AAAF methodology set forth in Section 1.9(b)(2).

HUD's reading of the limitation provision must be rejected for two additional reasons. First, the uncontested record in this case establishes that the automatic adjustment provision was a central provision of the HAP Contracts and that the owners would not have signed contracts that expressly contained the provision HUD asks the Court to imply. *See supra* p. 4. Second, HUD's reading of the HAP Contracts flies in the face of the fundamental principle of contract interpretation that all contract provisions are interpreted to the extent possible to harmonize with and give effect to other provisions of the contract, particularly other provisions that are central to the deal struck by the parties.[14]

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[14] *Muniz v. United States*, 972 F.2d 1304, 1320 (Fed. Cir. 1992) ("A cardinal rule of contract interpretation requires that an interpretation which

The mere fact that Section 1.9(d) is to be applied "notwithstanding any other provisions of this Contract," does not absolve the Court from giving effect to all provisions of the Contract, including Section 1.9(b)(2), which expressly requires use of automatic adjustment factors. The effect of the "notwithstanding" language is to indicate that Section 1.9(d) prevails over any other contract provision *with which it cannot be harmonized*. It was not intended to serve as a pretext for totally abandoning a formula method with which it can be readily harmonized and which is fundamental to the parties' agreement.[15]

In the summary judgment proceedings, HUD presented no evidence that it cannot produce accurate AAAFs for the markets or sub-markets in which Section 8 apartments are located.[16] Nor

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gives meaning to all parts of the contract will be preferred to one which leaves a portion of it useless, inoperative, meaningless or superfluous."); *Industrial Indemnity Co. v. United States*, 14 Cl. Ct. 351 (1988) ("The Court must give a reasonable meaning to all parts of the instrument, rather than leaving a portion of it useless."); *see Merrill-Ruckgaber Co. v. United States*, 241 U.S. 387, 392 (1916); 4 *Williston On Contracts* § 619 at 731 (3d ed. 1961).

[15] *See, e.g., McCain v. Cox*, 531 F. Supp. 771, 781 (N.D. Miss. 1982), *aff'd*, 692 F.2d 755 (5th Cir. 1983). In *McCain*, a party to a land contract attempted to avoid its obligations under the contract based on a contingency clause that was effective "[a]nything herein to the contrary notwithstanding." *Id.* The court reasoned that despite the all-encompassing language of the contingency clause, "[c]ontracts must be construed as a whole and effect given to all provisions unless such construction produces unfair or unreasonable results." *Id.* Thus, the court construed the contingency clause in a manner that gave effect to both the contingency clause, as well as all other contract clauses.

[16] Although HUD has made self-serving representations to Congress that producing accurate AAAFs would not be "cost effective" in some cases, *Report to Congress on the Adjustment of Contract Rents under Section 8(c)(2)(C) of the United States Housing Act of 1937* at 1 (lodged by HUD with the Court), HUD estimates that it can produce an accurate AAAF for a metropolitan area for $20,000. *Id.* at 5. In the context of a multi-billion dollar

has HUD asserted that application to the negotiated initial rent of a formula which accurately reflects inflation in the sub-market in which the assisted property is located would lead to material differences between rents of assisted and unassisted units. Any claim that increasing the initial negotiated rent by an accurate inflation factor leads to material differences must rest on the assumption that the Contract Rent rent HUD negotiated was too high and therefore the Contract Rent should increase at less than the market rate of inflation. Such a policy finds no support in the "overall limitation" which expressly permits "differences in rents between assisted and unassisted units to the extent that such differences may have existed with respect to the initial Contract Rent."

If there were any ambiguity as to the meaning of the overall limitation, that ambiguity would have to be resolved against HUD. In choosing among the reasonable meanings of a contract provision, "the provision should be construed less favorably to that party which selected the contractual language." *United States v. Seckinger*, 397 U.S. 203, 216 (1970). This principle applies with special force to the United States "because of the Government's vast economic resources and stronger bargaining position in contract negotiations." *Id; see Essex Electro Engineers, Inc. v. United States*, 22 Cl. Ct. 757, 763 (1991), *aff'd*, 960 F.2d 1576, *cert. denied*, 113 S. Ct. 408 (1992); *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).

HUD's contract arguments do not distinguish or even cite any established rules of contract construction. In fact, HUD turns these rules on their head by contending that the courts should give deference to HUD's interpretation of its own contractual obligations. As the cases cited above demonstrate, the

program, these are not the sort of numbers that would support a claim of impossibility of fulfilling the obligation to produce and apply accurate AAAFs.

central principle in all contract interpretation is to ascertain the intent of the parties, and the rules for discerning that intent are as applicable to contracts with the government as to contracts between private parties.

B. HUD's Election Of Automatic Adjustments Precludes Case-By-Case Adjustments Based On "Comparability Studies"

The statute authorizes two methods of rent adjustment: "changes in fair market rentals" and a "reasonable formula." The differences between the procedure HUD elected in the HAP Contracts (the formula) and the one it rejected (fair market rentals) are crucial.

"Comparability studies" and fair market rentals both fit into the genus described by the *Rainier View* court as "market surveys." *Rainier View*, 848 F.2d at 991. Both fair market rent calculations and "comparability studies" are carried out by local HUD field offices. HUD Handbook ¶ 8-2(a). The procedures used in developing fair market rentals, like those used in "comparability studies," involve numerous subjective judgments by employees of HUD's field offices.[17] Both "comparability

[17] In developing fair market rentals, the valuation section of the HUD field office must identify what constitutes "dwelling units of modest design, suitable for the market and climate of the market area." HUD Handbook § 8-3a(3). HUD Field Offices are warned to avoid both "too restrictive an interpretation of modest design" and "too liberal an interpretation." *Id.* § 3a(3). In compiling its sample of market rent comparables, the Field Office has wide discretion in deciding what units are "representative of newly constructed units of modest design." *Id.* § 8-3b. The mix of neighborhoods represented in the sample will have great influence on the level of fair market rentals. Once comparables are chosen, further subjective adjustments are made to account for the differences between a hypothetical standard unit and each unit chosen as part of the sample of comparable units. *Id.* § 8-3b(2). After preparing a schedule of "comparable" adjusted rentals, the Field Office is instructed to identify those rentals that "appear reasonable" and are "well supported by relevant market data" and to adjust all other rentals as may be necessary by interpolation. *Id.* § 8-3d(3).

studies," and fair market rentals are estimates in dollars of the appropriate rents for various types of modest housing. Fair market rentals and "comparability studies" are, thus, two closely related varieties of market surveys. The principal differences between them is that fair market rentals are based on twelve to fifteen apartments (rather than three to five) and typically reflect data from a broader geographic area than "comparability studies".

If in drafting the HAP Contracts HUD had chosen to rely on changes in fair market rentals as the methodology for adjusting rents, and the developers had agreed to participate in the Section 8 program on that basis, HUD could have argued that rent adjustments were allowed on the basis of reasonably formulated and properly implemented "comparability studies" without violating its contractual commitments. HUD's justification for use of "comparability studies" in that case would not be, as it is here, that the overall limitation provision gives HUD the right to abandon the method of rent adjustment it chose in the contract and adopt another totally different method. Rather, if HUD had chosen the fair market rental method of rent adjustments, "comparability studies" could be viewed as a species of the method selected in the HAP Contract. Direct rent adjustments based on such "comparability studies" would be a refinement of the fair market rental methodology, not an abandonment.

AAAFs, however, in contrast to both fair market rental determinations and "comparability studies," are not based on data collected by HUD field offices, but on the Consumer Price Index and the American Housing Survey. Subjective *ad hoc* judgments by local employees play no part in the computation of AAAFs. AAAFs are not determinations of absolute dollar levels of rent, but rather percentages of average rent change. They are not a species of "market survey" but rather belong to the genus of formula-based adjustment processes. "Comparability studies" are, therefore, in no sense a refinement of the Automatic Annual Adjustment Factor method HUD elected. As the Ninth Circuit held in *Rainier View*, use of "comparability studies" as an independent method of rent adjustment constitutes a repudiation of the method HUD elected and incorporated into the contracts. *Rainier View*, 848 F.2d at 991.

HUD attempts to obfuscate the issue by arguing that there are some differences between "comparability studies" and the procedures used in establishing fair market rentals. HUD Brief at 25-26. Certainly there are some differences. The Ninth Circuit did not, however, hold that by using "comparability studies" as an independent method of rent adjustment HUD was using the fair market rental method. Rather it held that use of "comparability studies" as an independent method of rent adjustment, although compatible with a fair market rental methodology, is incompatible with the formula method HUD actually chose. *Rainier View*, 848 F.2d at 991.

C. The Statutory Background Confirms That Rents Must Be Adjusted Automatically

If the Court finds any ambiguity in the contract language, the Court's effort to discern the intent of the parties should take into account the legislative scheme that authorized the contracts as those statutes were interpreted at the time.

Rent adjustments based on widely-applicable published information rather than case-by-case *ad hoc* adjustments are a central feature of the Section 8 program. *See supra* pp. 2-5. The authorized mechanisms for ordinary rent adjustments are set forth in subsection (c)(2) of Section 8:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of

dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

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(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.[18]

There is no dispute that subsection (c)(2)(A) provides two alternative methods of calculating ordinary rent adjustments: "changes in the fair market rentals" or "a reasonable formula." Subsection (c)(2)(A) makes no mention of "comparability studies" or of any other third methodology for making rent adjustments.

Subsection (c)(2)(C) addresses the amount of the adjustments. They are to be set at such a level that rents for assisted units will not be materially different from those for comparable unassisted units. HUD admits that the statute does not prescribe the methodology for achieving that result. HUD Brief at 20, 22; *see* HUD Ninth Circuit Brief at 21, 30. Nothing in the text or legislative history of subsection (c)(2)(C) suggests that it was intended to authorize a third methodology for making ordinary rent adjustments. On the contrary, subsection (c)(2)(C) explicitly refers to "adjustments in the maximum rents *as hereinbefore provided*," *i.e.*, adjustments as provided in subsection (c)(2)(A) (emphasis added). The reference at the end of subsection (c)(2)(C) to determinations by the Secretary gives the Secretary discretion to choose the method for determining whether the adjustments made under subsection (c)(2)(A) produce the appropriate level of rentals. It does not authorize the Secretary to adopt a method of making ordinary rent adjustments other than one of the two methods set forth in subsection (c)(2)(A).

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[18] 42 U.S.C. § 1437f(c)(2)(A), (C) (1976). Special "additional adjustments," not at issue in this proceeding, are provided for in subsection (c)(2)(B) of Section 8. 42 U.S.C. § 1437f(c)(2)(B) (1976).

D. HUD'S Regulations And Handbooks And Its Administration Of The HAP Contracts Confirm The Ninth Circuit's Interpretation

The HUD regulations in force at the time the HAP Contracts were signed reflect HUD's contemporaneous understanding both of the underlying statutory scheme and of the HAP Contracts. In addition, the regulations in force at the time the HAP Contracts were signed are an important guide to the owners' understanding of the contracts since the owners looked to the regulations for guidance in understanding the contract provisions and HUD's plans for implementing them. Finally, HUD's regulations and handbook provisions and its actual administration of the HAP Contracts during the first seven years constitute a "course of dealing" which reflects the parties' understanding of their agreement.[19]

The regulations in effect at the time the HAP Contracts were signed, and still in effect today, explicitly provide:

> The adjusted monthly amount of the Contract Rent of a dwelling unit *shall be determined* by multiplying the Contract Rent in effect on the anniversary date of the contract by the applicable Automatic Annual Adjustment Factor (see paragraph (a) of this section) and rounding the result to the next higher whole dollar amount.[20]

Until after these lawsuits were filed, there was no suggestion anywhere in the regulations that HUD considered it had authority under the statute or under the contracts to use any method of rent adjustment other than the Automatic Annual

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[19] The parties' course of dealing in performing a contract is "often the strongest evidence of . . . [its] meaning." *Restatement (Second) of Contracts* § 202g (1981).

[20] 24 C.F.R. § 888.203(b) (1992); 41 Fed. Reg. 49,440 (1976) (emphasis added).

Adjustment Factor. The regulations simply 1) required that adjustments be made by applying the AAAF, 2) prohibited materially different rents, and 3) provided that where application of unmodified factors would produce materially different rents, HUD would modify the factor.[21] These regulations were implemented in HUD Handbook provisions that required HUD to prepare modified factors whenever the rents produced by applying unmodified factors would be materially different from those for comparable unassisted units. *See supra* pp. 5-6.

For at least the first seven years of the Section 8 program, it is undisputed that HUD made rent adjustments by applying the AAAF factor and not by "comparability studies". Until at least 1981, no one had any reason to believe that HUD interpreted the statute or the HAP Contracts as permitting it to adjust rents by any method other than by applying the AAAFs, modified as necessary to prevent material differences in particular sub-markets. HUD obviously has altered its interpretation or this dispute would not exist. The relevant interpretation for purposes of discerning the intent of the parties is, however, the interpretation HUD gave at the time the contracts were signed, not the interpretation it invented years later. "In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made." *Restatement (Second) of Contracts* § 202 cmt. b (1981).

In light of HUD's election of the Automatic Annual Adjustment Factor, HUD's marketing of the program as one in-

[21] Although HUD has been doing "comparability studies" for more than a decade, the first regulations that provide for the use of "comparability studies" were published in proposed form on October 29, 1992. 57 Fed. Reg. 49,120 (1992). HUD claims that 24 C.F.R. § 880.609(c) supports its position. HUD Brief at 27-28. That regulation, however, merely reiterates that Section 8 rents shall not exceed those for comparable unassisted units. It does not mention "comparability studies," much less discuss their use as an independent method for making rent adjustments on a case-by-case basis.

volving automatic adjustments, and HUD's regulations and handbooks which declared that HUD would prepare factors for smaller markets where necessary and made no mention of "comparability studies," the owners neither knew nor had reason to know that HUD believed that the contracts permitted rent adjustments through "comparability studies." By contrast, HUD had ample reason to know that the owners expected automatic, not case-by-case, adjustments. Under such circumstances, any ambiguity in the contract must be resolved in accordance with the meaning attached to it by the owners, not HUD. *Restatement (Second) of Contracts* § 201(2) (1981).

II. SECTION 801 VIOLATES THE FIFTH AMENDMENT BY DEPRIVING OWNERS OF THEIR VESTED RIGHTS UNDER CONTRACTS WITH THE UNITED STATES

Section 801 purports to allow HUD to make future rent adjustments through "comparability studies" and to limit past rent adjustments to an amount determined by applying the AAAF not, as the HAP Contracts specify to the entire Contract Rent, but rather to the Contract Rent minus the amount required for debt service. The government estimates that the changes made by Section 801 will save HUD in excess of $1 billion by forcing owners to absorb costs HUD otherwise would have had to bear under *Rainier View's* interpretation of the HAP Contracts.

This the United States may not do. As this Court held more than a century ago:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality.

Union Pacific Railroad Co. v. United States (*Sinking-Fund Cases*), 99 U.S. 700, 719 (1879).

> Judge Learned Hand elaborated on this principle:
>
> [I]n the performance of [the government's] voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men.

Heil v. United States, 273 F. 729, 731 (8th Cir. 1921).

A. The Owners' Rights Under The HAP Contracts Are Property Protected By The Fifth Amendment

1. The Owners' Rights Under The HAP Contracts Are Not Subject To Defeasance

HUD does not dispute that the HAP Contracts are valid and that the owners have performed. HUD, nonetheless, contends that the owners' rights are subject to defeasance by legislation. HUD Brief at 32-33. HUD's contention rests on the startling proposition that the provision by a private party of goods and services under a written contract with the United States creates no indefeasable right to payment of the contract amount unless the United States surrenders in unmistakable terms its power to enact legislation declaring that it will not pay the contract amount. *Id.*

In fact, the United States did surrender in unmistakable terms its power to abrogate the HAP agreements. 42 U.S.C. § 1437c (1976) provides: "The faith of the United States is solemnly pledged to the payment of all annual contributions

contracted for pursuant to this section." The HAP Contracts implement that statutory provision: "The Faith of the United States is solemnly pledged to the payment of housing assistance payments pursuant to this Contract." Contract between HUD and Antelope Valley ¶ 1.3(a), Exhibit 2c to Goldrich Decl. The solemn pledge of the faith of the United States to the fulfillment of a contract is surely an unmistakable pledge that Congress will not abrogate central provisions of the contract by legislation.

The case on which HUD relies, *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41 (1986), does not support the proposition that the government is free to pay whatever it wishes - or nothing at all - for goods and services (whether they be Air Force jets, computers, highways, or cleaning services in federal buildings) unless the contract explicitly states that the government will not legislatively alter its obligations.

POSSE involved an agreement between the federal government and the State of California, not a contract with a private party to which the faith of the United States is solemnly pledged. The agreement regarded coverage of state employees by Social Security, not the provision of goods and services to the government. This Court expressly noted that *POSSE* did not involve "an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium." 477 U.S. at 55.[22]

This Court stressed that the agreement in *POSSE* "simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare." *Id.* It "exactly tracked the language of the statute, conferring no right on the State beyond that contained in § 418 itself." *Id.* The agreement provided that its terms were

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[22] In contrast, the HAP Contracts are with private parties for the provision of goods and services, and the private parties provided consideration by building and operating low income housing.

"in conformity with the underlying statutory provision." 477 U.S. at 54. "[T]he Agreement expressly incorporated § 418, which of course was fully subject to Congress' reserved power of amendment." *Id.* In the statute, the United States expressly reserved a right to "alter, amend or repeal" the act at any time. 477 U.S. at 52 (*citing* 42 U.S.C. § 1304). The language of reservation "expressly notified the State that Congress retained the power to amend the law under which the Agreement was executed and by amending that law to alter the Agreement itself." 477 U.S. at 54.[23]

Because of these characteristics of the agreement at issue in *POSSE* this Court held that " the 'contractual right' at issue in [*POSSE*] bears little, if any, resemblance to rights held to constitute 'property' within the meaning of the Fifth Amendment." 477 U.S. at 55. Under the HAP Contracts the owners enjoy exactly what the *POSSE* court was careful to distinguish: a right under a contract for which consideration has been provided.

Furthermore, the legislative impairment of the agreements in *POSSE* was an incidental effect of Congress' regulatory efforts to shape social policy by making participation in the Social Security program mandatory for certain State employees. Congress did this, among other reasons, because it believed that mandatory participation was necessary to protect workers who moved from job to job and to safeguard the integrity of a major social program. *Id.* Such protection of the health, safety and welfare of American citizens where vested contract rights are not at stake is undeniably an exercise of the government's legitimate police powers.

Despite HUD's attempt to characterize Section 801 as an attempt to "reform 'a comprehensive social welfare program

[23] The HAP Contracts, far from alerting owners that the contract might be changed by amending the statute, solemnly pledged the faith of the United States to the fulfillment of HUD's obligations.

affecting millions of individuals,'" HUD Brief at 43 (*quoting POSSE*, 477 U.S. at 53), Section 801 does not reshape social or economic policy. Section 801 does not modify the services provided to low-income families or senior citizens, establish new program eligibility requirements, streamline federal procedures, or change in any other way the scope or nature of the housing program. Section 801 simply transfers to Section 8 owners a significant part of the cost of that program. Section 801 is no more a reform of housing policy than a bill declaring that Congress intends to pay only half the contract price for cleaning of prisons is a reform of penal policy. Thus, *POSSE* cannot help HUD here.[24]

What this Court has said about states and municipalities which issue debt obligations can be applied with equal force to the United States when it contracts for the provision of goods and services:

> [I]nstead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.[25]

For this reason, "[i]n almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." *See Energy Reserves Group, Inc.*

[24] The other cases which the government cites, *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992), and *United States v. Sperry Corp.*, 493 U.S. 52 (1989), do not involve abrogation of rights under contracts with the government. They merely deal with the question of retroactivity and provide no support for the proposition that Congress retains the power to abrogate government contracts unless it explicitly renounces that power. *See infra* pp. 37-40.

[25] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 24 n.23 (1977) (*quoting Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

v. Kansas Power & Light Co., 459 U.S. 400, 412 n.14 (1983) (citations omitted). This principle applies with special force here because the government has solemnly pledged its faith to fulfillment of the HAP Contracts.

2. Vested Contract Rights Are Property Protected By The Fifth Amendment

"Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Specifically, a right to receive from the United States a benefit under a contract for which consideration has been provided is property for purposes of the Fifth Amendment. *POSSE*, 477 U.S. at 55.

B. Section 801 Substantially Infringes The Owners' Rights

HUD argues for the first time in this Court that Section 801 does not *substantially* impair the owners' contract rights and therefore is not unconstitutional. HUD Brief at 29-35. Like so much of HUD's argument, this assertion is based on the assumption that its "comparability studies" are an accurate measure of the rent due under the HAP Contracts. That assumption, as has been demonstrated, is false.[26] *See supra* pp. 7-11.

In the courts below, and even in its Petition for a Writ of *Certiorari*, HUD was far more candid. In *Alpine Ridge*, HUD did "not dispute that Section 801 substantially impairs plaintiffs' exercise of those rights." *Alpine Ridge Group*, 764 F. Supp. at 1399, Pet. App. at 27a. In *Acacia Villa*, HUD conceded that owners would receive retrospectively only 30 percent of what they would have received if the AAAF had been applied to the

[26] HUD's assertion that "comparability studies" affect only a small minority of Section 8 projects also lacks any foundation in the record and contradicts the experience of the parties to this litigation.

entire existing contract rent each time an adjustment was made. *Acacia Villa*, 774 F. Supp. at 1244, Pet. App. at 43a. The *Acacia Villa* court found that Section 801 "locks the project owners into a base rent that is lower than what would have been the base rent had the AAAF been used all along. The use of the depressed base rent in calculating future rent adjustments means that those adjustments will necessarily be lower than they would otherwise have been." *Id.* at 1247, Pet. App. at 50a. In the Ninth Circuit, HUD did not challenge these findings as erroneous and did "not dispute that Section 801 substantially impairs the owners exercise of [their] property rights." *Alpine Ridge Group*, 955 F.2d at 1387, Pet. App. at 12a. In its Petition, HUD told this Court that the difference between the amount it would pay under Section 801 and the amount it would have to pay if this Court upheld the Ninth Circuit's decision "will exceed $1 billion." Pet. at 23. Whether or not $1 billion is a substantial amount for HUD, a loss of $1 billion is surely a substantial impairment of the owners' rights.

C. Legislation That Abrogates Vested Rights Under Contracts With The United States Cannot Be Justified As "Curative"

HUD claims that Section 801 is constitutional because it "cures" what Congress viewed as the Ninth Circuit's erroneous interpretation of the HAP Contracts. HUD Brief at 37-40. The breadth of HUD's claim is startling. It asserts that even on the supposition that owners actually had the vested contract rights the Ninth Circuit held they enjoyed (even, that is, on the supposition that this Court finds the Ninth Circuit correctly interpreted the HAP contracts), the Constitution permits Congress to abrogate owners' rights if Congress disagrees.[27]

[27] This is neither a caricature nor an exaggeration of HUD's position. Section I of HUD's brief argues that the owners did not have the contract rights the Ninth Circuit held they had. Section II, B, 1 argues that *even if this Court holds the owners had vested rights*, Section 801 is constitutional as "curative legislation."

Rainier View held that the statute and the HAP Contracts require that Section 8 rents not be materially different from those for comparable unassisted units. *Rainier View* explicitly stated that HUD is required to take corrective action (by preparing an appropriate AAAF for the local sub-market) "whenever application of the formula would result in a disparity between section 8 and other rents." *Rainier View*, 848 F.2d at 991.[28] *Rainier View* also recognized that the *statute permitted* HUD to write contracts that would have permitted rents to be set directly through "comparability studies." It merely held that the *contracts* HUD elected to enter into do not permit direct rent adjustments through "comparability studies." *Id.*

In enacting Section 801, Congress took two actions that gave rise to this controversy: (1) it reduced the amount of retroactive adjustments by requiring that the AAAF be applied, not to the full Contract Rent (as expressly required by the HAP Contracts), but rather to the Contract Rent reduced by the amount dedicated to debt service; and (2) in violation of the HAP Contracts, it authorized HUD to adjust rents directly on the basis of "comparability studies" in the future if, in the Secretary's view, it was not practical to publish AAAFs for certain submarkets.

The curative legislation cases HUD cites[29] have no relevance to the issues raised by Section 801. The only constitutional issue raised by the curative legislation cases is whether the retroactive character of the curative statute violates the Constitution. The effect of classification of a law as curative is

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[28] HUD concedes that "*Rainier View* acknowledged that adjustments were limited by comparable rents." HUD Brief at 7; *see* HUD Brief at 30.

[29] *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992); *United States v. Sperry Corp.*, 493 U.S. 52 (1989); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Opdyke Investment Co. v. Detroit*, 883 F.2d 1265 (6th Cir. 1989); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

merely to provide one more motive for concluding that the law may be applied retroactively without violating the Fifth Amendment. *Temple University v. United States*, 769 F.2d 126, 134 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

"Curative laws are subject to the same constitutional limitations which apply to other legislation." 2 *Sutherland Statutory Construction* § 41.12 (4th ed. 1986). The curative character of a law has no relevance to whether the law would violate the Constitution (as would Section 801) even if applied prospectively only. As the Ninth Circuit held, the curative legislation cases relied on by HUD simply do not address the constitutionality of abrogating "bargained for *contract* rights, supported by independent consideration." *Alpine Ridge*, 955 F.2d 1386, Pet. App. at 10a (emphasis in original). The purported "curative" aspect of Section 801 is irrelevant to the issue of whether Congress may save money by legislatively abrogating (retroactively and prospectively) vested rights under a government contract for the provision of goods and services.

HUD claims that the Ninth Circuit erred in distinguishing the curative legislation cases on grounds that they did not involve "vested rights." HUD Brief at 38. This is a serious misreading of the Ninth Circuit's opinion. The Ninth Circuit did not say that none of the curative legislation cases involved "vested rights." Rather, it held that they did not involve "bargained - for *contract* rights supported by independent consideration." *Alpine Ridge*, Pet. App. at 10a (emphasis in original).

HUD stresses that the curative legislation upheld by this Court in *Graham & Foster v. Goodcell* deprived taxpayers of "vested rights." *See* HUD Brief at 37-38. HUD concludes that as "curative legislation" Section 801 may constitutionally deprive Section 8 owners of their vested rights. *Id.* Apparently HUD reasons that if curative legislation can destroy one vested right, it can destroy any vested right. In *Graham & Foster v. Goodcell*, the IRS had allowed the statute of limitations to run

because it had misunderstood the law. Absent the government's misinterpretation of the law, the taxes would have been collected and the taxpayers would have had no complaint. This Court permitted retroactive legislation to defeat the taxpayer's "asserted vested right" to protection under the statute of limitations because it was not "linked to any substantial equity." 282 U.S. at 429. This reflected the fact that rights under a statute of limitations do not enjoy the same degree of protection as other rights.[30] Because the rights at issue here are "bargained-for *contract* rights, supported by independent consideration," *Alpine Ridge*, 955 F.2d at 1386, Pet. App. at 10a (emphasis in original), they do involve substantial equity and are entitled to much more protection than rights under a statute of limitations.

None of the cases HUD cites, nor any of the other decided cases involving curative legislation, suggest that Congress' desire to "cure" what it believes to be errors in a court's interpretation of a government contract permits Congress to abrogate vested rights to payment for goods and services under a contract with the federal government which the private party has performed.

D. Because It Abrogates Federal Contracts With Private Parties In Order To Save Money,Section 801 Violates Due Process

1. Legislation That Abrogates Federal Contracts To Save Money Violates Due Process

Congress has directly repudiated central provisions of the HAP Contracts to save money. On the rare occasions when Congress has attempted to do something like this in the past, the courts have not felt obliged to engage in any balancing analysis.

[30] *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *see Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1476, 1477 (10th Cir. 1984).

Direct repudiation of a federal contract to save money is so clearly and strikingly unconstitutional that the courts have flatly stated, without explicit balancing, that Congress lacks authority to engage in such an act.

In *Lynch v. United States*, 292 U.S. 571 (1934), this Court held unconstitutional a provision of the Economy Act which canceled insurance policies the United States had previously issued to veterans. The Court held that Congress was without power to destroy the plaintiffs' vested contractual rights, despite the government's argument that the economic exigencies of the Great Depression justified its action:

> No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States.[31]

Likewise, in *Perry v. United States*, 294 U.S. 330, 350-51 (1935), this Court held that the United States could not legislatively repudiate its obligation to pay the principal and interest of certain bonds in gold coin of the standard of value existing at the time of issuance of the bonds:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers . . . . Con-

[31] 292 U.S. at 580.

> gress is authorized to pledge [the] credit [of the United States] as an assurance of payment as stipulated, as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise; a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our government.[32]

In *Seatrain Lines, Inc. v. United States*, 99 Ct. Cl. 272 (1943), Congress had passed legislation which prohibited payment on a government contract. The court refused to allow the government to nullify its contract: "[A] contract with the United States cannot be nullified by the United States unless it falls within the Federal police power or some other paramount power. No other power is claimed." 99 Ct. Cl. at 315.

In *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977), the D.C. Circuit held unconstitutional a congressional attempt to deny reenlistment bonuses to which Navy enlisted men were entitled under a formula in effect at the time of their reenlistment. The court stated that while "Congress may constitutionally impair existing contract rights in the exercise of a paramount governmental power such as the 'War Powers' . . . Congress is 'without power to *reduce expenditures* by abrogating contractual obligations of the United States.'" 533 F.2d at 1179-80 (*quoting Lynch*, 292 U.S. at 580) (emphasis in original).

In *POSSE*, this Court confirmed again, citing *Perry* and *Lynch*, that "Congress does not have the power to repudiate its

[32] The obligations the United States attempts to repudiate here involve the express pledge of the faith of the United States, and are, therefore, similar to those in *Perry*.

own debts, which constitute 'property' to the lender, simply in order to save money." 477 U.S. at 55.

In the face of this overwhelming authority, HUD candidly recognized in the Ninth Circuit that "[t]he United States is not free to repudiate its debt solely in order to reduce public expenditures." HUD Ninth Circuit Brief at 43. Here HUD is somewhat less forthcoming, but it never reaches the point of claiming that Congress can abrogate the United States' own contracts to save money. Rather, HUD focuses its energies on futile efforts to find some other purpose for Section 801.

2. Section 801 Was Passed To Save Money

The text of Section 801 confirms the Ninth Circuit's conclusion that Section 801's purpose was simply to save money. *Alpine Ridge*, 955 F.2d at 1387-88, Pet. App. at 14a. Retroactively, Section 801 simply reduces the base number to which the AAAF is applied, thereby reducing the amount of the payments to owners. *See supra* p. 13. Prospectively, Section 801 requires HUD to prepare AAAFs for smaller areas, but permits HUD to set rents directly through "comparability studies" in certain cases. *See supra* p. 14. The only effect of permitting direct adjustment of rent on the basis of case-by-case "comparability studies" is to reduce HUD's financial obligations to the owners.

The legislative history of Section 801 confirms that saving money was its purpose. The only apparent difference of opinion among its supporters was the amount of the anticipated savings.[33] For example, Senator D'Amato, Chairman of the Housing Subcommittee, a co-sponsor of the 1989 Act and an advocate of HUD's new rent adjustment formula, said that "[w]ithout a legislative remedy, the Federal Government would

[33] The bill was introduced in October 1989 and passed by Congress in December 1989 without committee hearings or reports. Statements made in the course of brief floor debate are, therefore, the principal legislative history of the bill.

have been forced [as a result of the *Rainier* decision] to pay over $600 million" to project owners, based on the original HAP Contracts, and that Section 801 "reduces this loss to $210 million — a savings of over $390 million." 135 Cong. Rec. S16,608 (daily ed. Nov. 21, 1989) (statement of Sen. D'Amato). The section-by-section analysis that accompanied the Senate bill noted that compliance with the contract would cost $600 million to $1 billion nationwide, whereas the "retroactive solution" would cost only $210 million. 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989). Recognizing legislative legerdemain when he saw it, Senator Sasser, Chairman of the Budget Committee, saluted Section 801 as a "fix" that "could save the Federal government hundreds of millions, if not more than a billion dollars." 135 Cong. Rec. S16,607 (daily ed. Nov. 21, 1989) (statement of Sen. Sasser).

Members of the House shared the same opinions. Congressman Wylie stated that Section 801 "will produce substantial reductions in costs estimated by HUD to be as high as $700 to $800 million." 135 Cong. Rec. H9690 (daily ed. Nov. 21, 1989) (statement of Rep. Wylie). Representative Gonzalez supported Section 801 because "if Congress did not act on this matter, the potential liability for the Government would amount to $2.1 billion over 10 years .... The resolution would reduce retroactive costs to $210 million and reduce prospective costs to $500 million over 10 years." 135 Cong. Rec. H9686 (daily ed. Nov. 21, 1989) (statement of Rep. Gonzalez). Congress' insistence on the savings Section 801 would bring demonstrates what its true purpose was.

In the District Courts, HUD argued that Section 801 had four purposes other than saving money. The District Courts carefully considered and rejected each of those purported rationales. *Alpine Ridge Group*, 764 F. Supp. at 1400, Pet. App. at 29a; *Acacia Villa, 774 F. Supp. at 1250*, Pet. App. at 57a-58a. On appeal, HUD argued only that the purpose of Section 801

was to resolve widespread disputes over HUD's use of "comparability studies" in adjusting Section 8 rents. *See* HUD Ninth Circuit Brief at 45, 47. The Ninth Circuit rejected this justification because the Constitution does not permit:

> Congress to legislate a compromise to disputes involving vested property rights in order to prevent costly and wasteful litigation. HUD's argument again assumes the absence of any vested property right in annual formula rent adjustments, an issue that we have decided against it.[34]

In this Court, HUD makes half-hearted attempts to revive the arguments it abandoned on appeal in the Ninth Circuit. *See* HUD Brief at 8, 42. Primarily, however, HUD now relies on a newly invented rationale, namely "to restore uniformity to the program's operation." HUD Brief at 14; *see* HUD Brief at 41. HUD does not cite a single line of legislative history to support its new contention that national uniformity of administration was the goal of Section 801. If uniformity were the goal HUD could, of course, achieve that goal by using the AAAF and publishing AAAFs for smaller markets where necessary. In any case, a desire to restore uniformity by refusing to honor the decision of a United States Court of Appeals is not a goal which justifies abrogating vested contract rights. If HUD were correct that Congress is permitted to restore uniformity in this way, no rights under a contract with the government would enjoy any legal protection. A victory in the courts would be self-defeating

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[34] *Alpine Ridge Group*, 965 F.2d at 1387, Pet. App. at 14a. The *Acacia Villa* court dismissed the purported justification of dispute resolution as "little more than bootstrapping. The dispute is about the fact that the contracts have been interpreted adversely to the government by the Ninth Circuit; the government now wants to avoid paying the project owners the amount that the contracts, as so interpreted, require. Again, the government is only concerned with dollars." 774 F. Supp. at 1250, Pet. App. at 59a; *see Alpine Ridge Group*, 764 F. Supp. at 1400, Pet. App. at 29a.

since it would, according to HUD's logic, provide justification for Congress to abrogate the rights vindicated by the court decision.[35]

Once the *post hoc* rationalizations invented by HUD's lawyers are revealed for what they are, it is clear that the primary purpose, indeed the only purpose, of Section 801 is to save money. As the Ninth Circuit held, under this Court's precedents, legislation that abrogates vested rights under government contracts with private parties to save money is unconstitutional. *Alpine Ridge*, 955 F.2d at 1387-88, Pet. App. at 14a.

E. Section 801 Cannot Withstand The Scrutiny Applied To All Federal Legislation That Abrogates Federal Contracts, Even Legislation Which Has A Primary Purpose Other Than Saving Money

Even if HUD's lawyers had succeeded in showing that Congress' primary purpose was restoring uniformity, Section 801 could not withstand the scrutiny applied to legislation that abrogates a federal contract in the course of implementing economic or social policy.

This Court has not directly answered the question of what standard of review applies to Federal economic and social legislation which destroys rights under contracts between the Federal government and private parties. This Court's cases, however, support the conclusion of the Seventh Circuit that when federal legislation interferes with rights under contracts to which the federal government is a party, "the special circumstance of the federal government's taking legislative action

[35] The hollowness of HUD's new-found rationale is highlighted by the fact that at the time Section 801 was passed, the Ninth Circuit's interpretation of the HAP Contracts was the only judicial interpretation of those contracts. No court outside the Ninth Circuit had spoken to the question. It would be unheard of for Congress to take upon itself to solve disputes among the Circuits concerning contract interpretation, but in this case there was not even a dispute.

which impairs a contract to which it is a party" justifies stricter scrutiny under the due process clause than that applied to economic and social legislation which impairs contracts to which the federal government is not a party. *Peick v. Pension Benefits Guaranty Corp.*, 724 F.2d 1247, 1264 n.22 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

The Contract clause does not apply to the federal government and, therefore, federal economic and social legislation that impairs contracts *between private parties* will be sustained if it has a rational basis. *See Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728-31 (1984). When, however, federal legislation deprives private parties of vested rights under contracts with the United States, this Court's reasoning in *United States Trust Co.* applies:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[36]

Although this Court had before it in *United States Trust Co.* a state statute which implicated the Contract Clause, it made clear that a "dual standard of review" is applied under the Fifth Amendment to federal legislation that abrogates contracts, quoting the "clear distinction" perceived by *Perry* "between the power of the Congress to control or interdict the contracts of private parties . . . and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers." *United States Trust Co.*, 431 U.S. at 26 n.25 (*quoting Perry*, 294 U.S. at 350-51).[37]

[36] *United States Trust Co.*, 431 U.S. at 26.

[37] HUD argues that because federal impairment of contracts between private parties is subject to less stringent review than state impairment of

The lack of uniformity that HUD now claims Section 801 is designed to resolve arises out of HUD's refusal to honor its obligations under the HAP Contracts outside the Ninth Circuit. HUD claims that the fact that it felt compelled to honor owners' rights in the Ninth Circuit, but could avoid doing so in other areas, is sufficient justification for legislation abrogating those rights throughout the country. To state the argument clearly is to refute it. If this were sufficient reason to justify abrogating a government contract to which the faith of the United States has been solemnly pledged, government contracts would be meaningless since the government could always refuse to honor contractual rights, defend unsuccessfully against litigation, and then "restore uniformity" by legislatively abrogating the rights the courts had upheld.

In summary, Section 801 would not pass scrutiny under the Due Process Clause even if it were understood as abrogating contractual provisions in the course of creating economic or social programs. Certainly Section 801 cannot be sustained for what it truly is: a measure which directly abrogates government contracts to save money.

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contracts between private parties, the standard enunciated in *United States Trust Co.* for state legislation that impairs the state's own contracts, "reasonable and necessary to serve an important public interest," does not apply to federal legislation that impairs federal contracts. HUD Brief at 36 n.35. This Court has not spoken to whether the "reasonable and necessary to serve an important public interest" standard applies to federal impairment of federal contracts. It has, however, clearly indicated that the standard for review of federal legislation that impairs federal contracts is higher than rational basis.

CONCLUSION

For these reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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